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NUMBER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM BERRY, APPELLANT

V.

COMMONWEALTH OF PENNSYLVANIA, APPELLEE

On Appeal From The Supreme Court Of Pennsylvania (Pennsylvania Supreme Court No. 680 E.D. Misc. Docket, 1981; Pennsylvania Superior Court No. 1564, Philadelphia, 1980; Philadelphia Common Pleas Court Information 1307, August Term, 1979).

JURISDICTIONAL STATEMENT

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I. QUESTIONS PRESENTED

1. Is Not Pennsylvania'a Rape Shield Statute, 18 Pa.C.S.A. §3104, Unconstitutional As Applied, Under The Federal Constitution Where, As Here, An Accused Is Denied Limited Relevant Critical Confrontation And Cross-Examination Of An Alleged Rape Victim In An Attempt To Refute The Inference Exploited By The Government That The Defendant Was Responsible For The Seminal Fluid Found In The Complainant's Vagina During A Medical Examination Hours After The Alleged Incident?

2. Was Not Appellant Denied Due Process Of Law And The Right To Present A Defense, As Guaranteed By The Federal Constitution, When It Precluded The Defense From Offering The Testimony Of Appellant's Wife For The Purpose Of Establishing That She Had Recent Sexual Intercourse With The Appellant To Explain The Origin Of Seminal Stains Found On Appellant's Undershorts When He Was Arrested Shortly After The Alleged Attack And Introduced Into Evidence By The Commonwealth?

II. TABLE OF CONTENTS

		PAGE
I.	QUESTION PRESENTED	1
II.	TABLE OF CONTENTS	2
III.	TABLE OF CITATIONS	3
IV.	OPINIONS IN COURTS BELOW	4
V.	GROUNDS ON WHICH JURISDICTION IS INVOKED	5
VI.	STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN APPEAL	6-7
VII.	STATEMENT OF THE CASE	9-12
VIII.	THE QUESTIONS PRESENTED ARE SUBSTANTIAL	13-20
	CONCLUSION	20

III. TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

ALFORD V. UNITED STATES
282 U.S. 687, 51 S.Ct. 218 (1931) — 14

DAVIS V. ALASKA
415 U.S. 308, 94 S.Ct. 1105 (1974) — 14,17

DUNN V. UNITED STATES
284 U.S. 390, 52 S.Ct. 189 (1932) — 19

FLOURNEY V. WIENER
321 U.S. 253, 64 S.Ct. 548 (1944) — 20

UNITED STATES V. DOTTERWEICH
320 U.S. 270, 64 S.Ct. 134 (1943) — 19

WASHINGTON V. STATE OF TEXAS
388 U.S. 14, 87 S.Ct. 1920 (1967) — 18

STATE CASES

COMMONWEALTH V. CARTER
444 Pa. 405, 282 A.2d 375 (1971) — 19

SHOCKLEY V. DeLAWDER
28 M.D. App. 212, 344 A.2d 446 (1975) — 17

STATE V. JALO
27 Or. App. 845, 557 P.2d 1359 (1976) — 17

STATE V. LaCLAIR
433 A.2d 1326 (N.H. 1981) — 16

OTHER SOURCES

AMBURG AND RECHTIN, RAPE EVIDENCE REFORM IN MISSOURI. A REMEDY FOR THE ADVERSE IMPACT OF EVIDENTIARY RULES ON RAPE VICTIMS
18 St. Louis Univ. Law J. 367, 386-87 (1978) — 16-17

BERGER, MAN'S TRIAL, WOMAN'S TRIBULATION: RAPE CASES IN THE COURTROOM
77 Col. L. Rev. 1, 57-58, 97-98 (1977) — 17

IV. OPINIONS IN COURTS BELOW

On November 12, 1980, the Honorable Curtis Carson of the Philadelphia Common Pleas Court, who was the trial judge, issued an opinion (unreported) in support of his denial of post-verdict relief, following appellant's taking of a timely appeal to the Superior Court of Pennsylvania. This unreported opinion is attached as Exhibit "A". A panel of the Superior Court of Pennsylvania affirmed appellant's judgment of conviction and sentence by per curiam order and memorandum opinion (unreported) on November 30, 1981, and these are collectively attached as Exhibit "B". Appellant's timely petition for allowance of appeal from the order of the Superior Court was denied on August 30, 1982, and a copy of this order is attached as Exhibit "C".

V. GROUNDS ON WHICH JURISDICTION IS INVOKED

Drawn into question in this case is the constitutional validity of Pennsylvania's rape shield statute, 18 Pa.C.S.A. §3104, challenged by appellant as being unconstitutional as applied to his case, on grounds of being repugnant to the Sixth and Fourteenth Amendments of the United States Constitution which guarantee an accused the right to confrontation and cross-examination and due process of law. Appellant's judgment of conviction and sentence was affirmed by the Superior Court of Pennsylvania, and on August 30, 1982, the Supreme Court of Pennsylvania entered an order denying appellant's petition for allowance of appeal.

A notice of appeal to this Court was filed in the Supreme Court of Pennsylvania, in the Superior Court of Pennsylvania, and in the Common Pleas Court of Philadelphia on October 26, 1982, and these are attached as Exhibits "D", "E", and "F" respectively.

This appeal is being timely docketed in this Court within 90 days from the Pennsylvania Supreme Court's order of August 30, 1982 denying appellant's petition for allowance of appeal from the Superior Court's affirmance of his judgment of conviction and sentence. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

VI. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN APPEAL

18 Pa.C.S.A. §3104

§3104. Evidence of victim's sexual conduct

(a) General Rule - Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) Evidentiary proceedings - A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

18 Pa.C.S.A. §3121

§3121. Rape

A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

(1) by forcible compulsion;

(2) by threat of forcible compulsion that would prevent resistance of a person of reasonable resolution;

(3) who is unconscious; or

(4) who is so mentally deranged or deficient that such person is incapable of consent.

18 Pa.C.S.A. §3126

§3126. Indecent Assault

A person who has indecent contact with another not his spouse; or causes such other to have indecent contact with him is guilty of indecent assault, a misdemeanor of the second degree, if:

(1) he knows that the contact is offensive to the other person;

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct;

(3) he knows that the other person is unaware that an indecent contact is being committed;

(4) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the knowledge of the other drugs, intoxicants or other means for the purpose of preventing resistance; or

(5) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATEMENT OF THE CASE

Appellant was arrested in his home on August 11, 1979 and charged with rape and related offenses. He was charged with the rape and indecent assault of his twenty five year old stepdaughter ("complainant") in the house shared by her, her children, appellant and his wife ("complainant's" mother). The District Attorney of Philadelphia returned Informations against him at August Term, 1979, after he was held for court following a preliminary hearing.

On January 16, 1980, appellant appeared before the Honorable Curtis C. Carson of the Philadelphia Common Pleas Court on Informations No. 1306 (rape) and 1307 (indecent assault) of August Term 1979 of Philadelphia County. At that time appellant's counsel made a pre-trial motion in limine. The Commonwealth had informed defense counsel that it intended to introduce at trial evidence that the complainant was examined a few hours after the alleged incident and found to have seminal fliud of undetermined origin in her vagina, vulva and cervix, and also that appellant's undershorts were seized at the time of his arrest and found to contain seminal stains. The motion in limine sought to prohibit the introduction of the evidence of the seminal fluid found inside the complainant, or, in the alternative, if such evidence was admitted, to permit the defense to cross-examine the complainant concerning whether she had sexual intercourse with any men other than appellant during the 24 hour period preceding the alleged sexual attack. The issue involved in this appeal was first raised at that time, as appellant contended that 18 Pa.C.S.A.

§3104, which absolutely prohibits such cross-examination, was unconstitutional as applied if defendant was denied the right to conduct this cross-examination of the complainant. Judge Carson ruled that this cross-examination would be prohibited and denied the motion in limine. Following the denial of the motion, trial began before Judge Carson and a jury.

The complainant testified that while sleeping in her bedroom one night with her two children, one of whom was in bed with her, she awoke to find the appellant, her step-father who lived in the same house, in her bed with his penis in her vagina. He then put on his undershorts and left her bedroom; neither child awoke during the alleged incident. She testified that she immediately went out of the house and reported the alleged incident to police, and a policeman responded minutes later and arrested appellant in his bedroom in the house, where he was sleeping in bed with his wife. A policeman testified that he received a report of the alleged incident from the complainant at 12:17 A.M. on August 11, 1979, and that appellant was arrested in bed in his house minutes later.

A microbiologist testified that an examination of specimens taken from the complainant's vagina, vulva and cervix conducted within a few hours of the alleged incident indicated the presence of prostatic seminal fluid, which is only found in males. Dr. Charles Tumosa a criminalist and supervisor of the police chemical lab testified that the seminal fluid found in the complainant could not be identified as having come from any particular male and could have been present for a period of up to 48 hours. The defense

was not permitted to ask the complainant whether she had sexual intercourse with a man other than appellant during the 24 hours time period prior to the alleged incident. Dr. Tumosa also testified that the seminal fluid found in the complainant and the seminal stain and spermatozoa found to be present on the undershorts taken from appellant at the time of his arrest was consistent with a single ejaculation from a male.

The defense was that the alleged incident never occurred. Appellant's wife, Mabel Berry, testified that she had an argument with the complainant (her daughter) before they went to sleep that night, and that she then went to her bedroom where her husband was already asleep in the bed they shared. She was sleeping on the side of the bed nearest the door, and she testified that her husband would have had to crawl over her to get out of the bedroom. She also testified that her sleep had been undisturbed until police came into the bedroom and arrested her husband in bed. When Mabel Berry was asked whether her husband had sexual intercourse with her on August 10, 1979 (within a day of the alleged incident), the prosecutor's objection was sustained, and the judge denied defense counsel a sidebar conference. After due deliberations the jury found appellant not guilty of rape, but guilty of indecent assault. Appellant filed post-trial motions and supplementary post-trial motions* which raised the issues presented by this appeal. These motions

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* Also submitted with supplementary post-trial motions was an affidavit of defense counsel stating that, if permitted, he would have informed the court at the sidebar conference which was denied him that he was attempting to offer the evidence of sexual intercourse between Mabel Berry and appellant to explain the presence of seminal stains found on appellant's undershorts when he was arrested in bed.

were denied on May 12, 1980, and on June 10, 1980, Judge Carson sentenced appellant to one to two years imprisonment on his conviction for indecent assault. A timely appeal was then filed in the Superior Court of Philadelphia, with the case being submitted on briefs. The constitutional invalidity of 18 Pa.C.S.A. §3104, as applied, as well as the other question presented in this jurisdictional statement, were specifically raised in appellant's brief and reply brief filed in the Superior Court. On November 30, 1981, a three judge panel of the Superior Court affirmed appellant's judgment of conviction and sentence.

A timely application for reargument en banc was filed in the Superior Court specifically raising the questions presented by this jurisdictional statement. A timely petition for allowance of appeal was also filed in the Pennsylvania Supreme Court which specifically raised each of the questions presented by this jurisdictional statement. On April 2, 1982 the Superior Court of Pennsylvania denied the application for reargument, and on August 30, 1982, the Pennsylvania Supreme Court denied appellant's petition for an allowance of appeal.

VIII. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. 18 Pa.C.S.A. §3104 Unconstitutional As Applied

This case presents the substantial fundamental question of whether a state, by statute, can absolutely preclude any evidence or cross-examination of an alleged sex crime victim concerning prior sexual intercourse with third persons, even in a case, such as the instant one, where to apply the statute denies the accused critical confrontation and cross-examination of the alleged victim which is necessary to refute an inference which the state is actively seeking to exploit.

In this case, appellant was accused by his adult daughter-in-law of sexually attacking her and having intercourse with her against her will in the house they shared with others, including his wife (her mother). The defense was that the claimed incident never occurred, no intercourse occurred, and that the complainant had fabricated the entire alleged episode. Prior to trial, the Commonwealth informed appellant that it intended to introduce evidence that, when medically examined, within a few hours after the alleged incident, the complainant was found to have seminal fluid in her vagina.

Appellant, in an attempt to refute the inference being sought by the government, that appellant was responsible for the seminal fluid found in the complainant's vagina, requested that he be permitted to cross-examine the complainant concerning whether she had intercourse with any individual other than the defendant during the twenty-four hour period*

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* There was expert testimony at trial that the seminal fluid found in the complainant's vagina could have been present for a period up to forty-eight hours before the examination took place.

preceding the alleged sexual attack. On the basis of Pennsylvania's rape shield statute, 18 Pa.C.S.A. §3104(a), the defendant was not permitted to conduct such cross-examination. The statute explicitly prohibits such inquiry concerning alleged past sexual conduct between the alleged victim and others, and only permits such evidence or inquiry concerning alleged sexual relations between a defendant and an alleged victims in limited circumstances involving a consent defense.*

Pennsylvania'a rape shield statute, like those in many other states, has the laudatory purpose of protecting alleged victims of sexual attack from embarrassment, humiliation and harassment in the courtroom by barring improper inquiries concerning past sexual conduct. While the goal is laudatory, it is equally clear that such a statute with an absolute ban on any cross-examination or evidence concerning sexual conduct between the alleged victim and third persons will sometimes be applied in a manner which is so unfair as to violate the constitutional rights of the accused.

This Court has in the past made clear that a trial court may not "cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination," as it unanimously reversed a conviction where the defendant was not permitted to ask the prosecution witness where he lived. Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 220 (1931). More recently, in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105

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* The fact that Pennsylvania's rape shield statute law prohibited the proposed cross-examination, and the assertion that the statute as applied to appellant's case would abridge his constitutional rights was raised at all stages of the proceedings, but the Superior Court of Pennsylvania simply ignored the constitutional question presented by rejecting it on the basis that the legislature intended to prohibit such questioning. See Exhibit "B".

(1974), it was held that a state statute designed to protect a juvenile witness from embarrassment and humiliation by prohibiting inquiries at trial concerning his juvenile record of adjudications, had to yield to a defendant's right to conduct limited relevant cross-examination, as this Court concluded "that the right of confrontation is paramount to the State's policy of protecting a juvenile offender." Id. at 319, 94 S.Ct. at 1112.

The cross-examination sought by the defendant was carefully circumscribed and limited to a time period when sexual intercourse by the alleged victim with others would have provided an explanation for the seminal fluid found in the alleged victim's vagina. The prohibition of such relevant cross-examination on the basis of Pennsylvania's rape shield statute meant in practical terms that the Commonwealth was permitted to bolster its case with physical evidence which inferentially corroborated the alleged victim's claim that the defendant had sexual intercourse with her, while the defense was prohibited from conducting cross-examination of the alleged victim in an attempt to rebut this inference.* When a rape shield statute is applied in such a manner it denies a defendant a fair trial, as guaranteed by the due process clause, and an adequate opportunity to confront and cross-examine his accusers, as recognized by other courts

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* Defense counsel's pre-trial motion sought to either bar the introduction of the physical evidence concerning the seminal fluid in the alleged victim's vagina, or to permit the requested limited cross-examination. The lower court therefore, could have prohibited the introduction of the physical evidence rendering the requested cross-examination irrelevant, and thus avoided a constitutional clash between the rape shield statute and the rights of the accused. It was not constitutionally permissible to make the one-sided ruling which the court did, permitting the Commonwealth to introduce its evidence while denying the defendant the relevant proposed defense questioning.

and commentators. If the government offers evidence of a physical condition of an alleged victim in a sex case, such as seminal fluid in the vagina, allegedly caused by the defendant, this Court should hold that the defendant has a right to conduct limited relevant cross-examination of the alleged victim in an attempt* to show a source other than the defendant for the physical condition (e.g. the seminal fluid) that was found to be present. See e.g., State v. LaClair, 433 A.2d 1326 (N.H. 1981); Shockley v. State, 585 S.W. 2d 645, 649-51 (Cr. App. Tenn. 1978); Amburg and Rechtin, Rape

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* The trial judge seemed to view appellant's right to cross-examine the complainant about prior sexual intercourse as dependent on a factual showing that there had, in fact, been prior intercourse. Given the private nature of most instances of sexual intercourse such a showing is obviously almost impossible. More significantly, it is well settled that the right to cross-examine is not conditioned on one's being able to first establish the answers to the proposed questions.

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner even though he is unable to state to the court what facts a reasonable cross-examination might develope.
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> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219 (1931).

Evidence Reform In Missouri: A Remedy For The Adverse Impact Of Evidentiary Rules On Rape Victims, 18 St. Louis Univ. Law J. 367, 386-87 (1978); Berger, Man's Trial, Woman's Tribulation: Rape Cases In The Courtroom, 77 Col. L. Rev. 1, 57-58, 97-98 (1977). Set also State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976) (In Banc); State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975).

Because Pennsylvania's rape shield statute, 18 Pa.C.S.A §3104, was applied in the case at bar to deny the accused his constitutional right to confront and cross-examine his accusers, this Court should decide whether, despite its laudatory purpose Pennsylvania's rape shield law, like the juvenile shield law in Davis v. Alaska, supra, must also yield in some circumstances to the constitutional rights of the accused on trial.

B. Due Process Right To Present Relevant Defense Testimony

Appellant was arrested within minutes of the alleged sexual attack, and undershorts he was wearing at the time were chemically analyzed. At trial the Commonwealth introduced evidence that the undershorts were found to contain seminal stains, and these shorts were the only Commonwealth exhibit presented and admitted as evidence. The Commonwealth, of course, had a right to present this evidence of semen stains on appellant's undershorts in an attempt to corroborate the complainant's accusation that defendant forced her to have sexual intercourse with him. However, once again the trial judge made a ruling that denied appellant the opportunity to attempt to rebut the inference sought to be established by the Commonwealth's evidence.

Appellant was not permitted to offer evidence of a source for the Commonwealth's physical evidence of semen stains on his undershorts, other than sexual intercourse with the complainant, in this case, where the defense was that no sexual intercourse or other sexual contact took place with the complainant. The trial judge improperly refused the defendant the opportunity to establish that on the same night of the claimed incident, before it allegedly occurred, the defendant had sexual intercourse with his wife Mable Berry, and that at that time he was wearing the same undershorts (C-1) which were found to have semen stains when he was later arrested in his bed shortly after the alleged incident.

Due process of law and the right to compulsory process are offended when the trial court permits the introduction of only the Commonwealth's version of the facts, while prohibiting the defense from offering evidence that may weaken or dispel the suggested inference:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Washington v. State of Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967).

The memorandum opinion of the Pennsylvania Superior Court panel did not reach the question presented but rather asserted that the exclusion did not harm appellant because it found that the acquittal by the jury on the rape charge

rejected a finding that sexual intercourse occurred, while defendant was convicted of indecent assault. This conclusion overlooks the fact that the introduction of the evidence of the seminal stains on the undershorts and the Commonwealth's sought-after inference that the seminal stains on defendant's undershorts were there as a result of an attack on the alleged victim by appellant, corroborated not only the rape charge but also the indecent assault charge because it tended to show, if believed by the jury, that appellant ejaculated while involved in an incident with the complainant.

The panel's memorandum decision also misapprehended the law, since, in a case where the defense testimony was that the alleged incident never happened at all and the Commonwealth contended that a rape as well as an indecent assault occurred, the jury's finding of guilty of indecent assault and not guilty of rape cannot be viewed as the acceptance or rejection of any particular evidence by the jury, but rather might well be a compromise verdict. See e.g. United States v. Dotterweich, 320 U.S. 270, 279, 64 S.Ct. 134, 135 (1943); Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189 (1932); Commonwealth v. Carter, 444 Pa. 405, 282 A.2d 375 (1971).

In a case where the Commonwealth's evidence against appellant was far from overwhelming, and consisted only of the testimony of the alleged victim, aside from the physical evidence which the defense was prohibited from rebutting through limited cross-examination and the presentation of defense evidence, the result of the trial court's erroneous

and unconstitutional rulings was a one-sided trial with a conviction that should not be permitted to stand.*

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Chief, Appeals Division
BENJAMIN LERNER, Defender

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* This case is properly on appeal because of the unconstitutional application of Pennsylvania's rape shield statute, 18 Pa.C.S.A. §3104. The second erroneous and unconstitutional ruling prohibiting the defense from offering relevant evidence to attempt to explain the semen stains on appellant's undershorts presents an issue that by itself is not capable of being brought on appeal, but this Court has recognized that the denial of a federal constitutional right can be included in an appeal, when the appeal is properly before the Court. See Flourney v. Wiener, 321 U.S. 253, 64 S.Ct. 548 (1944).